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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

Petition for Rehearing

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Now comes Illinois Central Railroad Company, Respondent, and presents herewith its petition for rehearing of this cause and respectfully prays that a rehearing be granted upon the grounds and for the reasons hereinafter set forth.

I.

Initially, respondent wishes to call to the Court's attention the undeniable fact that within the last decade the respondent has been confronted with an increasing reluctance on the part of both trial and appellate judges, and in both the state and federal courts, to withhold *any* case

that is brought under the Federal Employers' Liability Act from a jury determination, either as to negligence or as to causation. A motion for a directed verdict in a suit under this statute has received little attention from trial judges because of what is represented as the position of this Court. But, we have also noticed that such motions received careful consideration by the judiciary in other types of negligence cases.

We have read the opinions of learned appellate judges who have questioned whether or not this Court is committing the judiciary to the philosophy that this once recognized negligence statute should be considered a law that awards compensation for injuries without regard to fault. *Griswold* v. *Gardner*, 155 F. 2d 333. We are familiar with this Court's comment upon such an observation. *Wilkerson* v. *McCarthy*, 336 U.S. 53. In the latter case, Justice Frankfurter, in a concurring opinion, has pointed out that the trial judge must determine whether there is solid evidence presented that will support a jury's verdict; that a timid judge who simply leaves all cases to the jury's determination has failed in his duty as a judge. But it appears that many become timid as a course of least resistance to the views of this Court.

We feel that this Court's decision in the instant case, if allowed to stand, departing as it does from sound decisions concerning the quantum of proof that must be present before a negligence case can be submitted for a jury's determination, will result in making a mockery of a defendant's heretofore undisputed right to have peremptory motions passed upon after calm and careful deliberation by the trial court.

We do not mean to imply that we will be faced with timid judges in every case, but we do sincerely believe, due to the present announcements of this Court, that all judges

will be inclined to treat cavalierly the defendants' motions on questions of negligence and causation in suits under this statute.

We emphasize that if the opinion is allowed to stand in the instant case, although respect in passing is paid to rules of negligence law, the Court will make by judicial fiat a railroad the insurer of the safety of its employees. Congress certainly never intended that the judiciary should abrogate its constitutional duty and obligation to protect defendants from legally unfounded claims. *Brady* v. *Southern R. Co.*, 320 U.S. 476. The decision in the instant case and others announced on the same day open the treasuries of every railroad because they undeniably hold that any statement by a plaintiff, no matter how unfounded or lacking in probative force, makes a submissible case for the jury. Perjury will be more rampant than ever because, no matter how strong the proof to the contrary, by way of impeachment or evidence indicating the improbability of any statement, this will only be a question for jury determination. The historical division of functions between judge and jury is brushed aside and the judge as a part of the court becomes a mere figurehead. Inferences may be drawn from either proved or unproved possibilities and the jury allowed to speculate at random.

The word "negligence" is not defined in the Federal Employers' Liability Act and there is no tenable basis in law or logic to construe that term in this statute as having some special or esoteric content or as anything else than a statutory absorption of the common law concept. The fact that Congress has not converted it to a compensation statute does not give the Court the right to legislate the act into a compensation act by judicial circumlocution. There is nothing in the act which indicates that it should be treated any different than any common law negligence

action, except for the removal of certain defenses. The quantum or quality of proof, the requirement of proof by the greater weight of the evidence on the part of the plaintiff, and what type of case is proper to submit to the jury are questions that should be determined under general negligence principles.

It is obvious there remains no defense for defendants if a plaintiff is going to be sustained by this Court with evidence that is without a scintilla of value. Here the plaintiff stated he stepped on a cinder and fell. He was looking in the direction in which he was walking but did not see the cinder prior to his fall. After he fell he looked at the ground and observed an object of the size described. The condition of the roadbed was a bit soft so in walking one would leave a footprint. (R. 14-15) No other member of the crew was shown the cinder. Plaintiff stated he threw it away. (R. 62) There was no evidence that a cinder of the size described can be said to be a "large clinker." It was not an object large enough to create a reasonable anticipation it would cause one to trip over. Established substantive rules applicable to common law negligence in this type of claim teach (a) the respondent is not an insurer but chargeable only with the duty of exercising *reasonable care* to keep the place where work is performed reasonably safe for the workmen, *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649; (b) mere existence of the cinder and the happening of an accident did not infer fault or negligence, *Delaware L. & W. R. Co.* v. *Koske*, 279 U.S. 7; *Patton* v. *Texas & P. Ry. Co.*, 179 U.S. 658. The burden of proof is on plaintiff. *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573, 575, 576. From a substantive law standpoint the plaintiff utterly failed in his proof. We suggest that the distinction between the petitioner's case and the settled

rules of the common law is worthy of the Court's reconsideration in its philosophy of what constitutes proof of negligence under the Act to this type of case.

II.

The Court misapplied controlling principles of law as enounced by its former decisions in Federal Employers' Liability Act cases.

The Court's opinion approaches negligence problems from an unusual aspect. It has disregarded its former decisions in which it stated that before a submissible case is made there must be *more* than a scintilla of evidence, but evidence sufficient to enable reasonable persons to infer both negligence and causation by reasoning from the evidence. *Moore* v. *Chesapake & O.R.Co.*, 340 U.S. 573; *Brady* v. *Southern Ry. Co.*, 320 U.S. 476; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54; *Tennant* v. *Peoria & Pekin U. Ry. Co.*, 321 U.S. 29.

This Court in the cases decided with the instant case, *viz.*: the *Rogers* (No. 28) and *Ferguson* (No. 59) cases, holds that if the negligence of the employer played any part, even in the "slightest," or, where the negligence played any part, however "small," a submissible question is presented which, in effect, reduces to the irreducible the quantum of proof or the quality of proof which heretofore had been required. The fact that the Federal Employer's Liability Act is a comparative negligence statute and that contributory negligence is not a bar to recovery is not, and never has been, held to reduce the plaintiff's burden of proving by a preponderance of evidence the employer's negligence.

Likewise, in the *Rogers* decision, a portion of which is set out in the opinion in the instant case, this Court concludes that a negligence action brought under the provisions of the Federal Employers' Liability Act differs significantly in certain respects from an ordinary common law negligence action. If by that statement it is meant that the significant differences are the abolishment of the doctrine of assumption of risk and the substitution of comparative negligence, then we would agree. However, it is submitted that neither this act nor the previous decisions of this Court contain any other language that suggests modification of principles applicable to other negligence cases. By this we mean questions relating to the burden of proof that plaintiff must meet, the preponderance of evidence, and the quantum or quality of proof that must be presented before such a case can be submitted to a jury's determination. This Court has consistently held that, subject only to the express qualifications that Congress has written into this negligence statute, the cause of action must be tried under *common law* concepts of negligence and injury. *Bailey* v. *Central Vermont Ry., Inc.*, 319 U.S. 350; *Urie* v. *Thompson*, 337 U.S. 163; *Stone* v. *New York C. & St.L.R. Co.*, 344 U.S. 407.

III.

The Court's finding that there were probative facts in evidence to justify with reason an inference of negligence is not supported by the record.

This Court has predicated liability of the respondent on the presence of a cinder about the size of petitioner's fist as a hazardous condition in respondent's roadbed. The basic assumption by the Court for this conclusion was that plaintiff slipped on a cinder "about the size of (his) fist" imbedded in the roadbed. This statement of the petitioner,

which is quoted in the opinion, is not complete. The record at page 14 reads as follows: "About the size of my fist, *I guess.*" Petitioner on cross-examination, when questioned closely as to the size of the cinder in question, admitted his pretrial statement that it was approximately six inches in circumference. He further stated he knew what circumference meant and indicated it to the jury. (R. 63-64)

There was no issue that cinders two inches in diameter created a hazard in a railroad roadbed. The testimony of the section foreman is that cinders two inches in *diameter* would be about the largest used. (R. 73) It is common knowledge that two inches in *diameter* approximates six inches in circumference, the latter being petitioner's own estimate of the size of the cinder.

Respondent never conceded that the cinder in question, as described by petitioner, constituted a hazard in its roadbed or that it was as large as a man's fist. Indeed, it would be ludicrous for a railroad with 6,500 miles of right of way to concede that a single cinder, six inches in circumference, in a passing track, constitutes a hazard. It is common knowledge that railroading is not performed in a ballroom or parlor. That is true of coal mining, farming, oil drilling, road building, construction jobs and hundreds of other occupations. The opinion is not at all realistic in its viewpoint. All of the facts upon which the Court relies to predicate an inference of negligence in placing the cinder in question in the roadbed, or the failure to find such a cinder by a reasonable inspection, relate to and are dependent upon the basic assumption that the cinder in question was the size of a man's fist. In the absence of proof of this basic fact, the Court's conclusion of liability must fail.

The Court, assuming it was a hazard, states that there was ample evidence for a jury to determine that the procedure should satisfy the standard to be expected from a prudent man in light of the hazard to be prevented. The Court states that the ballast was not screened, but merely visually inspected. There was no evidence that any railroad or any employer doing similar work, including respondent, screened ballast. The Court stated that, since repair work was done, the jury might find that the cinder in question was in the ballast used and that, since it had been there for three weeks, the roadbed inspection was not proper. The evidence of care exercised by the respondent, which was uncontradicted, the Court says can be ignored and, in fact, can give rise to *inferences* of negligence. The Court cannot, with reason, find that the jury might disbelieve respondent's affirmative testimony and thereby create affirmative proof. As the Court stated in *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573, at page 576:

> "True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt* v. *Sierra Butte Gold Mng. Co.*, 138 U.S. 438, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it."

The Court says that it is questionable whether there was any burden on the plaintiff to show any other standard procedure. By this the Court intimates that a lay jury can prescribe proper railroad maintenance procedures without any evidence in the record as to other procedures available, or no matter how restrictive they might be in the normal operation of a business.

In analyzing the record objectively, one cannot lose sight of the fact that this accident was caused by the

presence of a *single* cinder. The practical effect of the Court's decision is that a jury, "without evidence" other than the fact that an accident occurred, is authorized to speculate far beyond the record and, without control by the courts, as to some way or procedure that would have prevented the accident from occurring. This destroys the fundamental concepts of negligence as understood by the judiciary generally and persons vitally affected by negligence law.

The majority opinion states that a measure of speculation and conjecture is required in choosing what seems to be the most reasonable inference. This is a matter of semantics. One of the definitions in Webster's Dictionary is as follows:

> "*Speculate*—To theorize from conjectures without sufficient evidence."

This is wholly incompatible with the opinion's stated requirement that probative facts must be presented from which a jury can reasonably conclude that the test of negligence has been met. As this Court has previously held in *Moore* v. *Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 578:

> "This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway* v. *U.S.*, 319 U.S. 372, 395."

IV.

The Court's arbitrary finding that the questions not passed upon by the Court of Appeals are unsubstantial deprives the respondent of due process of law.

The Court summarily disposes of questions which were not considered in the briefs and oral argument in this Court. In the Court of Appeals the respondent assigned, briefed and argued substantial questions including the giving of a number of erroneous and highly prejudicial in-

structions. These were among the assignments which the Court of Appeals, because of its conclusion as to the insufficiency of evidence to sustain the verdict, found "unnecessary to consider other assignments of error." Specifically, but without limitation thereto, one of the assignments raised the impropriety of giving instructions concerning "assumption of the risk." It is indeed noteworthy that one of the justices of this Court, who did not even participate in the decision on the merits herein, specifically stated in the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54 (1942 l.c. 72):

> "'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. *Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded.*" (Emphasis added)

It is earnestly urged that the action of this Court in summarily disposing of these questions without permitting the Court of Appeals to pass on the merits of same and without affording the respondent an opportunity to present and argue the assignments in this Court deprives the respondent of due process of law. We respectfully submit that orderly process of judicial administration would more properly be served by the direction of this Court to the Court of Appeals, in any remanding order, to consider and rule upon the assignments not heretofore considered, as was done in *Senko* v. *LaCrosse Dredging Corporation*, No. 62, opinion in which was also announced February 25, 1957. Respondent respectfully contends that the giving of said instruction on assumption of risk and of other in-

structions assigned as error in the Court of Appeals were highly prejudicial and more logically account for the jury's verdict than the proof which this Court holds furnished ample support for inferences of negligence. It may be that the summary disposition of these assignments indicates a tacit approval of these instructions which this Court does not fully intend.

CONCLUSION.

The opinion of the Court in this and other Federal Employers' Liability cases decided the same day, if permitted to stand, eliminating as they do the element of reasonable foreseeability in negligence actions, deprive respondent and other interstate carriers of any standard of conduct to prevent being mulcted in damages.

For the foregoing reasons, respondent prays that this petition for rehearing be granted.

Respectfully submitted,

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STATE OF ILLINOIS
COUNTY OF COOK } ss

Joseph H. Wright, one of the counsel for respondent, being first duly sworn, deposes and says that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JOSEPH H. WRIGHT

Subscribed and sworn to before
me this 20th day of March, 1957.

MARY L. O'CONNOR
Notary Public